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Supreme Court, U.S.
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No. 94-501

In The

Supreme Court of the United States

October Term, 1994

LYNETTE HINSHAW,

Petitioner,

v.

GLORIA S. MAHLER; KENNETH J. MAHLER, Individually and as Personal Representatives of THE ESTATE OF CHRISTIAN DEVON MAHLER, Deceased,

Respondents.

and

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD NATION,

Intervenor/Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(as stated by Petitioner)

1. Did the Ninth Circuit abrogate case law [*Montana v. U.S.*, 450 U.S. 544, 564-65 (1981) and *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985)] concerning imposition of tribal court adjudicatory civil jurisdiction over non-Indians by relying upon dicta in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987), already placed in question in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, at 247 n. 10 (1989), to impose civil adjudicatory jurisdiction over a non-member?

2. Did the Ninth Circuit err in allowing a tribal court civil adjudicatory jurisdiction over a survivorship tort claim involving a non-Indian and the estate of a non-Indian, premised upon a supplemental jurisdiction concept, when tribal adjudicatory jurisdiction was non-existent?

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STATEMENT OF THE CASE

Gloria Mahler is an enrolled member of the Confederated Salish & Kootenai Tribes of the Flathead Nation and she resides on the Flathead Reservation in Montana with her husband Kenneth. On July 4, 1986, their minor son Christian Devon Mahler was killed in a car/motorcycle accident which occurred within the exterior boundaries of the reservation. At the time of the accident Christian was residing with his parents on the reservation. Christian was not an enrolled member of the Tribes. The driver of the car was Lynette Hinshaw, a non-member, who resided with her parents within the exterior boundaries of the reservation.

Gloria and Kenneth Mahler commenced a wrongful death and survivorship action against Hinshaw in the Tribal Court. Hinshaw specially appeared and moved to dismiss for lack of subject matter jurisdiction. The Tribal Court and the Tribal Appellate Court upheld the jurisdiction of the Tribal Court. Hinshaw filed a "Petition for Review" which appeared to be a complaint for declaratory relief challenging Tribal Court jurisdiction in the United States District Court. The District Court and the Court of Appeals upheld the subject matter jurisdiction of the Tribal Court.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS FOLLOWED THE GUIDANCE GIVEN BY THE SUPREME COURT IN *NATIONAL FARMER'S UNION* AND *IOWA MUTUAL.*

In *National Farmer's Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985) the Supreme Court held that when the jurisdiction of a Tribal Court is challenged in a case against a non-member, the Tribal Court itself must determine its jurisdiction. In reaching that conclusion, the Court said:

> "Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." 471 U.S., at 855-56.

In *National Farmer's Union* the Court was not called on to determine the extent of Tribal Court jurisdiction over non-members, but it sharply distinguished between its prior decisions on criminal jurisdiction, namely *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978) where the Court held that tribes do not have criminal jurisdiction over non-Indians who commit crimes on the reservation, and civil jurisdiction. That distinction had a historical basis in executive and Congressional policy. 471 U.S., at 854-55.

In *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987) the Supreme Court reiterated the exhaustion requirement

holding that it required a resort to appellate remedies available in a tribal court system before resort to the federal courts. This decision was premised on a recognition of the federal government's policy of encouraging tribal self-government and that Indian tribes retain sovereignty over their members and territory to the extent that it has not been withdrawn by federal statute or treaty. 480 U.S., at 14. The Court observed that Congress has specifically encouraged the development of tribal legal systems and it reiterated the distinction between criminal and civil jurisdiction. 480 U.S., at 14-15. The Court went on to say:

> "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. [citations omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. 'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.' *Merrion v. Jicarilla Apache Tribe,* 455 U.S. , at 149, n. 14." 480 U.S., at 18.

It is clear from a reading of the opinions of the Court of Appeals and the lower courts that they made a careful examination of tribal sovereignty and concluded that the tribes have in fact reserved as much power as they can to resolve legal disputes arising within their territory and affecting their members. Tribal Ordinance 40-A expressly creates a system of concurrent jurisdiction between the Montana state courts and the Tribal Court over certain

matters including the operation of motor vehicles on public roads within the reservation. Ordinance 36-B grants personal jurisdiction and subject matter jurisdiction to the Tribal Court, and the provisions of that ordinance clearly cover the accident involved in this case. *See, Appendix to Petition,* D-4 – D-5 (opinion of Court of Appeals) and C-12 – C-17 (text of Ordinance 36-B and 40-A).

The Court of Appeals found that the jurisdiction of the Tribes has not been limited by treaty or statute. *See, Appendix to Petition,* D-5. Moreover, in her petition the Petitioner has not identified any treaty or statute that limits the jurisdiction of the Tribal Court, and she did not identify any treaty or statute at any stage in this case. Since there is no federal limitation on the assertion of tribal court jurisdiction in this case and since the tribal ordinances assert jurisdiction to the fullest extent allowed by federal law, the Supreme Court's prior holdings in *National Farmer's Union* and *Iowa Mutual* compel a decision upholding the jurisdiction of the Tribal Court.

II. THE DECISIONS OF THE LOWER COURTS ARE BASED ON FACTS UNIQUE TO THE FLATHEAD RESERVATION AND SUPREME COURT REVIEW WOULD GIVE LITTLE GUIDANCE TO THE LOWER COURTS EXCEPT AS TO CASES ARISING ON THE FLATHEAD RESERVATION.

In upholding the subject matter jurisdiction of the Tribal Court, the Court of Appeals focused on Tribal Ordinance 36-B which asserts jurisdiction of the Tribal Court to the full extent allowed by federal law, and 40-A which creates a system of concurrent jurisdiction over

cases on specified subjects involving tribal members arising within the reservation. Ordinance 40-A is a response to a law enacted by the Montana Legislature in 1963, codified at Mont. Code Ann. sec. 2-1-302, which provides that in the event the Tribes adopt a resolution expressing a desire to subject their peoples and lands to the civil and criminal jurisdiction of the state, the governor would issue a proclamation to that effect. Ordinance 40-A was enacted on May 5, 1965 and created a system of concurrent jurisdiction and reserved to the Tribes all jurisdiction not expressly dealt with by the Ordinance. The governor issued his proclamation on October 8, 1965, extending the jurisdiction of the state to the reservation as stated in the Ordinance.

In *Larivee v. Morigeau*, 184 Mont. 187, 602 P.2d 563, *cert. denied*, 445 U.S. 964 (1979), the Montana Supreme Court found, in a case filed by a non-member against a member (petitioner erroneously states in her petition at page 15 that *Larivee* involved two Indian parties but the Montana Supreme Court said it was a case of a non-Indian against an Indian, 602 P.2d, at 565), that the Ordinance did in fact create a system of concurrent jurisdiction between the state courts and the Tribal Court over torts arising from automobile accidents on the reservation.

The body of law on the concurrent jurisdiction of the state courts and Tribal Court over matters arising on the Flathead Reservation is unique to the Flathead Reservation. Neither Ordinance 40-A, the governor's proclamation, nor the holding of the Montana Supreme Court in *Larivee* have any applicability to any other reservation, either in Montana or in any other state. *See e.g., Larivee,*

supra, 602 P.2d, at 571 (specifically limiting the case to the Flathead Reservation). Nor has the Petitioner identified any similar situation anywhere else in the United States.

Moreover, what is particularly unique is that the Montana Supreme Court and the Court of Appeals for the Ninth Circuit, which includes Montana, have reached a consensus on the jurisdiction of the Montana state courts and the Tribal Court on matters arising within the Flathead Reservation. The Petitioner has not identified any sound policy reason why the United States Supreme Court should upset that consensus and interfere with a resolution that satisfies the interests of the State of Montana, the federal government, and the Tribes.

III. NOTHING IN *BRENDALE* OR ANY OTHER SUPREME COURT OPINION IS CONTRARY TO, LIMITS, OR MODIFIES THE GUIDANCE GIVEN BY THE SUPREME COURT IN *NATIONAL FARMER'S UNION* AND *IOWA MUTUAL*.

Petitioner argues that the Court of Appeals erroneously relied on language in *Iowa Mutual* to the effect that there is a presumption in favor of tribal court jurisdiction and that in so doing it failed to give a careful analysis of the extent to which tribal sovereignty had been altered, divested, or diminished. Petitioner claims that the presumption language is *dicta* and has been placed into question by the Court's holding in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

First, the Court of Appeals never mentioned the presumption language contained in *Iowa Mutual*. The case

was cited for other reasons in the discussion on the survivorship claim, which was a claim of Christian Mahler based on his injuries which passed to his estate when he died. The basis for tribal court jurisdiction is the wrongful death claim which is a claim of Gloria Mahler, personal to her, for the injury she suffered as a result of the death of her son. The District Court did mention the presumption language, but it also stated that it was required to carefully examine tribal sovereignty pursuant to *National Farmer's Union*, and then it embarked on an extended discussion of the tribal ordinances and the Montana Supreme Court's opinion in *Larivee*.

Second, there is no opinion of the Court in *Brendale*. The language cited by the Petitioner is taken from the opinion of a four justice plurality. The opinion in *Iowa Mutual* is an opinion of the Court joined in by eight justices, including three of the four in the *Brendale* plurality. The fourth justice was not on the Court when *Iowa Mutual* was decided. Further, the portion of the plurality opinion in *Brendale* relied on by Petitioner does not mention the presumption language. Instead it makes reference to statements about retained tribal sovereignty in both *Iowa Mutual* and *National Farmer's Union*.

The presumption language in *Iowa Mutual* is not *dicta*. That case is procedurally complex, but essentially a member sued a corporation and its insurance carrier for a tort occurring on the reservation. The carrier alleged lack of coverage as an affirmative defense and filed a diversity action in federal court seeking a declaration that its policy did not cover the incident. The practical effect of its diversity action, had it been allowed to go forward, would be to defeat tribal court jurisdiction to determine

the affirmative defense. The carrier argued that diversity jurisdiction overrode the federal policy of deference to the tribal courts. In direct response to that argument, the Court said that tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty and civil jurisdiction over such activities presumptively lies in the tribal courts. 480 U.S., at 17-18. A statement of the Court's rationale for ruling against a contention argued by one of the parties to a case is not *dicta.*

IV. PENDENT JURISDICTION IS COMPELLED BY THE FACTS OF THIS CASE, MONTANA LAW, PRINCIPALS OF JUDICIAL ECONOMY AND VIOLATES NO LIMITATION ON TRIBAL COURT JURISDICTION IDENTIFIED BY THE PETITIONER.

This case presents two claims. One is a wrongful death claim which is personal to Gloria Mahler and her husband. The second is a survivorship claim, which is the claim of Christian Mahler which passed to his estate upon his death. Under Montana law the personal representatives of the decedent's estate are required to bring both claims in one action and the survivorship action is to be brought for the benefit of the decedent's heirs, which in this case are Gloria and Kenneth Mahler. Mont. Code Ann. sec. 27-1-513. Not only does Montana law require one action, but so do notions of judicial economy and the avoidance of contradictory results.

Petitioner argues that jurisdiction of the survivorship claim is based on a supplemental jurisdiction theory provided for by 28 U.S.C. sec. 1367, which applies only to federal courts. Petitioner goes on to argue that supplemental jurisdiction is a creature of statute, and without the statute, no such jurisdiction would exist. Actually, that section was enacted in 1990. Before then claims could be brought in federal court under concepts of pendent jurisdiction and ancillary jurisdiction without statutory support. Pendant jurisdiction was not new in 1990.

Petitioner mischaracterizes the holdings of the lower courts when she states that a non-member can be sued in tribal court in a case over which the court lacks jurisdiction merely by joining it to a case over which it does have jurisdiction. In this case there is an obvious common nucleus of operative fact. Both claims are based on the negligent conduct of Lynette Hinshaw. The District Court said its decision was limited to the specific circumstances of this case. *See, Appendix to Petition,* C-25, C-27 – C-28. The District Court best addressed the Petitioner's argument when it said:

> "Exclusive state court jurisdiction over the survivorship claim in this case would place Gloria Mahler on the horns of a dilemma and force her to make a decision which could impact not only her rights as an individual litigant but also upon the lawful authority of the Tribal Court itself. If the state is granted exclusive jurisdiction over the survivorship claim, Gloria Mahler will be forced to either split the litigation between two separate courts with the resulting increase in costs and waste of judicial resources, or take the entire action, including the wrongful

death claim, into state court. Exclusive jurisdiction in state court of the survivorship claim in this situation would, therefore, constitute a de facto limitation on Tribal sovereignty by obstructing Gloria Mahler's right to proceed in Tribal Court because of practical and economic obstacles in her path." *Appendix to Petition*, C-25 – C-26.

CONCLUSION

The lower courts engaged in the careful analysis of the jurisdiction of the Tribal Court required by *National Farmer's Union*. The Petitioner has not identified any statute, treaty, executive policy, or judicial opinion which would divest the Tribal Court of the Flathead Reservation of jurisdiction of this case. The decisions of the lower courts demonstrate an effort to deal with tribal court jurisdiction issues in a careful manner on a case by case basis and without sweeping generalizations, which is what the Petitioner is asking the Supreme Court to do. The writ should be denied.

Respectfully submitted,

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